

0007-00

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER
OF
EDUCATION

Residency of Emily R.

DECISION

Held: A final residency decision in this matter must be stayed until a local level hearing officer makes a finding as to whether or not Cranston has provided this student with FAPE. We believe that the local level hearing officer has primary jurisdiction over the question of whether or not Cranston has provided this student with FAPE. We will render a decision on residency after the local level hearing officer has decided all issues relating to FAPE for this student.

DATE: April 5, 2000

TRAVEL OF THE CASE

This is a school residency case. Jurisdiction is present under R.I.G.L. 16-64-8. Cranston contends that in August of 1999 the student concerned in this case became a resident of Kentucky and that this student is therefore no longer the educational responsibility of Cranston. The student's mother contends that her daughter is still the educational responsibility of Cranston. In a separate proceeding the student's mother has instituted a due process hearing at the local level, in Cranston, in an effort to demonstrate that:

- Cranston has violated her daughter's due process rights.
- Cranston has not provided her daughter with a free appropriate public education.(FAPE)
- Cranston is responsible for the cost of her daughter's private special education placement in Kentucky.

At the local level hearing Cranston has denied all these allegations. The only issue before the Commissioner is the question of the school residency of this student.

POSITION OF THE MOTHER

The mother contends that the public schools of Cranston have failed her daughter. She claims that she has sent her daughter to Kentucky to enroll her in a private special education school that can provide her with an appropriate education. The mother contends that she owns a house in Cranston, that she continues to live there, and that Cranston is therefore responsible for educating her child. She relies on the Regulations to the Individuals with Disabilities Education Act (IDEA)¹ which state at 34 CFR 300.403(c):

(c) *Reimbursement for private school placement.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private... school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

The mother simply argues that she is trying to do nothing more than to recover the cost of this placement, as permitted by regulation. To Cranston's argument that her daughter is no longer living in Rhode Island she answers that if Cranston had provided her daughter with FAPE that is where she would be living.

¹ 20 USC 1415, et seq.

POSITION OF CRANSTON

Cranston argues that at all times it has provided this student with a free appropriate public education. (FAPE) It argues that in the past it has even had to go to Court to compel the attendance of this student so that she might receive this education. More to the point Cranston argues that this student has been living in Kentucky since August of 1999 and that because of this Kentucky education authorities are now responsible for educating this student. Cranston points out that it did not make this placement. It therefore argues that it has no responsibility for it and that this student is now a resident of Kentucky for school purposes. Cranston argues that the record conclusively demonstrates that this student moved to Kentucky because her mother could not care for her in Rhode Island. It argues that this student's educational problems had little or nothing to do with her move to Kentucky. It points out that this student is not in a residential school placement. The student attends a day school and lives the rest of the time with her aunt.

BURDEN OF PROOF

Cranston alleges that the student has been sent to live in Kentucky with relatives because the mother of the student is no longer able to care for her. The burden of proof is therefore on Cranston:

16-64-3. Burden of proof. —In any proceeding where it is alleged that a child's residence has been changed due to illness of a parent, the break-up of the child's family, abandonment of the child by his or her parents, or emancipation of the child, the party alleging the existence of these circumstances shall have the burden of proof and shall make proof by a preponderance of the evidence.

FINDINGS OF FACT

The student in this case is thirteen years old. Her emotional problems have made it difficult for her to cope with school. One board-certified physician filed a letter dated February 12, 1999 stating that this student:

Has been followed sporadically by CES (Comprehensive Emergency Services) in Cranston for domestic problems, including her father leaving home and her mother unable to get her to go to school. According to [a social worker] [the student] has some degree of depression and is unable to fulfill her school obligations. I have known [the student] and her family for many years and I feel that a serious problem exists for which significant psychiatric management will be necessary.

I would encourage the authorities to understand the serious family disruption and accept her past absences with the stipulation that her mother will follow-up with the psychologist and have periodic progress reports sent to the authorities.²

The same physician wrote on March 22, 1999:

In follow-up to my letter of February 12, 1999, I am writing in regards to [the student's] medical condition. I examined [her] on March 19, 1999, and have diagnosed her as having extreme anxiety, panic attacks, and depression.

Her significant family disruption, with multiple social and emotional issues, has led her to an inability to attend school. I believe this should be temporary, but I have insisted that she be seen by a psychiatrist for possible treatment.

Please provide tutoring for the remainder of academic year 1998-99, or until the psychiatrist amends this request.

The geographical facts of this residency case are relatively clear. For many years the family lived in Cranston. Eventually there was a separation in the family. The mother continued to live in Cranston with the children. The father moved to Narragansett. The mother of this family is now suffering from a serious illness. She has had to make a number of stays at Rhode Island Hospital and, at times, when she has been unable to care for herself, she has stayed with her parents in Mansfield, Massachusetts. Her two oldest daughters have taken up residence with their grandparents in Mansfield and they attend the Mansfield public schools. In August of 1999 the mother sent her youngest daughter, the subject of this case, to live with her aunt in Kentucky. This student is now attending a private special education school in Kentucky. The student's family arranged for this placement. This placement was not arranged by Cranston or by any public school in Kentucky.

OFFICIAL NOTICE

We take official notice of the fact that both the State of Rhode Island and the State of Kentucky receive funds under the Individuals with Disabilities Education Act (IDEA), 20 USC 1414, and that these States must therefore conform to the requirements of the IDEA. See: *In re Michael C.*, 487 A.2d 281 (R.I. 1985) and *Smith v. Cumberland School Committee*, 415 A.2d 169 (R.I.1980)

² School Committee Exhibit 3

CONCLUSIONS OF LAW

School residency law has nothing to do with legal concepts such as “domicile”. The purpose of school residency law is to facilitate compliance with the compulsory education law so that all children within the state’s jurisdiction may receive a proper education. Since in Rhode Island public education, while remaining a state function, is administered by town school committees it is necessary to assign each child to the appropriate town school system. Rhode Island school residency law creates a rebuttable presumption that the town residence of the child’s parents is the residence of a child for school purposes. In fact it would probably be unconstitutional to establish an irrebuttable presumption that the school residence of a child is always the residence of his or her parents. At least one court has said that a ‘policy of excluding minor children from school unless the child has a parent or legal guardian living in the school district violates the equal protection and due process clauses. *Horton v. Marshall Public Schools*, 769 F.2d 1323 (1985).

Many children, for many good reasons, cannot live with their parents. They must live with relatives or friends because their parents are sick, incapacitated, missing, or working far away. School residency law is drafted in a way to accommodate these facts of life—after all the state has an overriding interest in seeing that all children attend school. Rhode Island’s residency law states in pertinent part:

16-64-1. Residency of children for school purposes. —

Except as otherwise provided by law or by agreement, a child shall be enrolled in the school system of the town wherein he or she resides. A child shall be deemed to be a resident of the town where his or her parents reside. If the child’s parents reside in different towns the child shall be deemed to be a resident of the town in which the parent having actual custody of the child resides. In cases where the child has no living parents, has been abandoned by his or her parents, or when parents are unable to care for their child on account of parental illness or family break-up, the child shall be deemed to be a resident of the town where the child lives with his or her legal guardian, natural guardian, *or other person acting in loco parentis to the child*. ... In all other cases a child’s residence shall be determined in accordance with the applicable rules of the common law....

In fact the Rhode Island school residency statute is nothing more than a restatement of the common law of school residency. The common law of school residency is well stated in *Joel v. Board of Education*, 686 N.E.2d 650 (1997):

The child’s residence in a district other than that in which his parents reside is sufficient to entitle him to attend school tuition-free in the district in which he resides so long as such residence was not established solely to enjoy the benefits of free schooling.

Cranston argues that we should apply these principles to this case as we have applied them in other cases. *LaBonte v. Smithfield*, Commissioner of Education, September 6, 1994; *Laura Doe v. Narragansett*, Commissioner of Education, April 17, 1984; *John A.Z. Doe v. Pawtucket*, Commissioner of Education, June 1, 1994; *John and Jane Doe v. Johnston*, Commissioner of Education, May 27, 1993; *In Re Residency of John C. Doe*, Commissioner of Education, May 19, 1997; *Jane A.T Doe v. Foster/Glocester*, Commissioner of Education, February 3, 1997

A case supportive of Cranston's position, but not cited by it, is *Craven County Board of Education v. Willoughby* 466 S.E.2d 334 (N.C.App. 1996), 106 Ed. Law Rpt. 334. In the *Craven County* case the North Carolina Court of Appeals held that a student from Florida who was living in North Carolina because her mother could not care for her was, under a state law implementing the IDEA, eligible to attend the public schools of North Carolina. *Mutatis mutandis*, this case is quite similar to the present matter. In any event Cranston argues that we would subvert the beneficial purposes of the residency law if we ruled that this student, in spite of the fact that she is now living in Kentucky, is a school resident of Rhode Island simply because her mother still resides in Cranston. Cranston correctly points out that a school residency rule that ineluctably tethered the school residency of child to the residency of a parent would injure far more children than it would help.

The mother, however, sees this case in a very different light. She contends that her daughter has always been a resident of Cranston for school purposes and that her daughter went to a private school in Kentucky to obtain the education that she claims Cranston failed to provide. The mother contends that this case is not about residency but rather about her allegation that Cranston has failed to provide her daughter with FAPE.

This case, therefore, hinges to a great extent on whether or not Cranston provided this student with FAPE. If Cranston made FAPE available to this student, and the mother disenrolled this student from the public schools of Cranston and sent her to a private school in Kentucky, this private school placement would amount to nothing more than that—a private school placement for which Cranston has no real responsibility. After all, Cranston can argue, that the IDEA regulations state:

No private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.³

This is the rule whether the private school is located in Meshanticut Park in Cranston or Frankfort in Kentucky. On the other hand, if Cranston has failed to provide this student with FAPE we could not fault the mother for looking for a suitable special education placement close to the home of a relative. Moreover, the mother might well argue that she was saving Cranston money by finding a suitable private school that saves Cranston the cost

³ IDEA Regulations, 34 CFR 300.454(a)

of a residential placement and that limits its liability to no more than the cost of a day-school tuition.

In fact, however, the record as it now stands tends to support Cranston's argument that this student moved to Kentucky because her mother, due to illness, could no longer care for her. Still we are reluctant to foreclose the mother from making her argument that she choose the Kentucky placement because Cranston had failed to provide her daughter with FAPE. We believe that, as a rule, local level hearing officers should judge FAPE related issues. Our view of the residency issue present in this case could change if a local level hearing officer came back with a decision that Cranston had failed to provide this student with FAPE. If such a finding were to be made, the residency argument made by the mother would be strengthened. Cases of this nature are very fact specific. See: *Catlin v. Sobol*, 93 F.3rd 1112 (2d Cir.1996)

CONCLUSION

We conclude that a final residency decision in this matter must be stayed until a local level hearing officer makes a finding as to whether or not Cranston has provided this student with FAPE. Nothing we have said here should be considered as a comment on the issue of provision of FAPE. We have heard no evidence on this point. We believe that the local level hearing officer has primary jurisdiction over the question of whether or not Cranston has provided this student with FAPE.

We will render a decision on residency after the local level hearing officer has decided all issues relating to FAPE for this student.

Forrest L. Avila, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

DATE: April 5, 2000